

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Implementation of Section 224 of the Act; |) | WC Docket No. 07-245 |
| Amendment of the Commission's Rules and |) | |
| Policies Governing Pole Attachments |) | RM-11293 |
| |) | |
| |) | RM-11303 |
| |) | |

**REPLY COMMENTS OF
BRIGHT HOUSE NETWORKS, LLC**

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EXECUTIVE SUMMARY

Bright House Networks, LLC (“BHN”), operates cable systems serving over 2.2 million customers in and around Tampa Bay and Central Florida (Orlando), Birmingham, Indianapolis, Bakersfield and Detroit, as well as several smaller systems in Alabama and the Florida panhandle. It therefore has a strong interest in the outcome of this rulemaking proceeding that the Commission initiated to ensure that its “regulatory framework” for pole attachments “remains current and faithful to the pro-competitive, market-opening provisions of the [Communications] Act.” *Implementation of Section 224 of the Act; Amendment of the Commission’s Rules & Policies Governing Pole Attachments*, Notice of Proposed Rulemaking (“NPRM”), WC Docket No. 07-245, ¶ 1 (released Nov. 20, 2007).

BHN generally agrees with the Commission’s tentative conclusion that “all attachers should pay the same pole attachment rate for all attachments used to provide broadband Internet access service.” *NPRM*, ¶ 26. And it agrees with the commenting parties that the Commission has the authority to adopt a uniform rate. The Pole Attachment Act vests the Commission with broad discretion to adopt a just and reasonable rate for pole attachments used for broadband services regardless of the platform over which such services are provided. Thus, while Section 224 enacts rate methodologies applicable to pole attachments used for two discrete communications services, the statute also grants the Commission authority to adopt a separate just and reasonable rate for

unlisted communications services, such as broadband Internet service commingled with cable television service or telecommunications service. The Commission has exercised this authority in the past, and the courts, including the United States Supreme Court, have approved.

While the Commission proposes to adopt a new rate that falls somewhere between the Cable Rate and the Telecom Rate, the Commission should instead simply adopt the Cable Rate for broadband attachments. See *NPRM*, ¶ 36. The Cable Rate is set at the upper bounds of the statutory range set by Congress, thereby allowing utilities to recover their fully allocated costs of pole attachments. That is, the Cable Rate requires cable operators to pay a proportionate share of the costs of the *entire* pole – including its usable and *unusable* space. Given that utilities recover their fully allocated costs of pole attachment under the Cable Rate, the rate does not – as an economic matter cannot – include any subsidy for cable operators or their subscribers, as the Commission assumes in its *NPRM*. Indeed, as the comments demonstrate, the Cable Rate actually *overcompensates* the utilities given that cable operators receive so few rights under pole attachment license agreements and that they must pay for the incremental costs of pole attachment through the make-ready process, *in addition to the Cable Rate rental*.

Furthermore, the Commission should make clear that the Cable Rate, which should serve as the new uniform broadband rate, applies to current disputes over the appropriate rate applicable to cable operators' commingled

attachments used for broadband Internet access services and Voice over Internet Protocol (“VoIP”) service. That would serve important and pro-competitive goals. It would resolve the number of disputes, both before the Commission and in state courts, over the pole attachment rate applicable to attachments used to provide VoIP service. It would also lift the threat of vexatious litigation currently clouding cable operators’ deployment of facilities-based voice competition. At the very least, the Commission should hold that any rate different from the Cable Rate, which under Commission precedent applies to cable operators’ commingled attachments used for broadband services, applies only prospectively, and that the Cable Rate applies to pre-existing rate disputes.

The Commission should not, however, undertake to sweep incumbent local exchange carriers (“ILECs”) within the ambit of Section 224. See *NPRM*, ¶ 23 (requesting comment on “our authority to regulate pole attachment rates for incumbent LECs”). As most commenters recognize, the plain language of the statute flatly precludes the Commission from doing so. Under Section 224, ILECs are utilities subject to rate and access obligations; they are categorically excluded from rate and access protections. This statutory ban, however, does not engender any serious parity concerns over the different payments made to electric utilities by cable operators and competitive local exchange carriers (“CLECs”), on the one hand, and ILECs, on the other. ILECs receive far greater rights under their joint use agreements than cable operators and others receive under pole attachment license agreements. Based on this

reality, even were the ILECs to pay higher pole attachment rates than cable operators and CLECs – and it is not clear that they do in most cases – the Commission need not worry that such a rate differential is unfair or discriminatory.

The Commission should also decline to modify its attaching entity presumptions based on self-reported and self-serving data submitted by the electric utilities. The Commission need not be concerned about this issue in this proceeding if it recognizes the wisdom of applying the Cable Rate to commingled attachments used to provide broadband Internet access service. But in any case, there is simply no way for the Commission, or the commenting parties, to meaningfully verify or contest that data in the context of this broad-based rulemaking proceeding. Yet the utilities' data cannot be accepted at face value, for it is often inaccurate and misleading. In fact, the entity analysis that Tampa Electric Company ("TECO") submits here is currently the subject of a complaint brought against it by BHN that remains pending before the Commission. It would therefore be inappropriate for the Commission to alter long-standing presumptions based on the utilities proffered data, especially where the utilities have a mechanism for rebutting the presumptions in concrete cases where the data can be properly vetted.

Finally, with respect to the *NPRM's* inquiry into pole attachment terms and conditions, *see NPRM*, ¶¶ 37-38, BHN agrees with the commenting parties that the Commission should not undertake to rework or overhaul its rules. Instead, the Commission should reaffirm key existing precedents. Thus, the

Commission should reaffirm its sign and sue rule. That rule provides a vital check on utilities' abuses of their bargaining power as owners of an essential facility for cable operators. Imposing arbitrary time limits on cable operators' right to challenge unjust and unreasonable terms and conditions of pole attachment is inconsistent with this Commission's statutory mandate to police unreasonable attachment terms. It would also carry the untoward and unintended consequence of bloating this Commission's pole attachment complaint docket and further straining scarce Commission dispute-resolution resources.

The Commission should also reaffirm its rule that communications attachers need not pre-license attachments to drop poles. Utilities have historically permitted attachers to permit drop poles after they are made, owing to the fact that such attachments pose no safety and reliability issues. And this practice serves the important, pro-competitive purpose of allowing cable operators to provide their subscribers with timely service.

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BHN respectfully submits these Reply Comments in response to the Commission's November 20, 2007, *Notice of Proposed Rulemaking* ("NPRM") in WC Docket No. 07-245, published in the Federal Register on February 6, 2008. See 73 Fed. Reg. 6879 (Feb. 6, 2008).

- I. The Commission Should Adopt The Cable Rate For Pole Attachments Used To Provide Broadband Internet Access Service.**
 - A. *The Commission Unquestionably Has Discretion To Apply The Cable Rate To Pole Attachments Used To Provide Broadband Internet Access Service.***

There is wide agreement among the commenting parties, including electric and telephone utilities, that the Commission retains time-tested and Supreme-Court approved discretion under Section 224 to adopt a uniform pole attachment rate based on the Cable Rate for pole attachments used by cable

operators and CLECs to provide broadband Internet access service commingled with other communications services. ^{1/} There can be little doubt that the Commission has such authority.

Section 224 explicitly mentions only two rate methodologies, one applicable to attachments “used by a cable television system solely to provide cable service,” 47 U.S.C. § 224(d)(3), and another applicable to “pole attachments used by telecommunications carriers to provide telecommunications services,” *id.* § 224(e)(1). Yet the two rate methodologies enshrined in subsections (d)(3) and (e)(1) do not exhaust the entire universe of potential communications services provided by cable television systems and telecommunications carriers. Rather, these two discrete classes of service are “subsets of . . . , *not limitations upon*,” the broader category established in

^{1/} See AT&T Comments at 23; Comments of Knology, Inc. at 5-6; Comments of Alabama Cable Telecommunications Association; Broadband Cable Association of Pennsylvania; Broadband Communications Association of Washington; Cable Telecommunications Association of Maryland, Delaware & D.C.; Cable Television Association of Georgia; Cable Telecommunications Association of New York, Inc.; Missouri Cable Telecommunications Association; New England Cable & Telecommunications Association, Inc.; Oregon Cable Telecommunications Association; South Carolina Cable Television Association; Texas Cable Association at 19-22 (“State Cable Associations”); Comments of Verizon at 6-16; Comments of Time Warner Cable Inc. at 44-47; Comments of the Utilities Telecom Council at 13-14; Comments of Ameren Services Co. & Virginia Elec. & Power Co. at 19-22; Comments of PacifiCorp, Wisconsin Elec. Power Co. & Wisconsin Pub. Serv. Corp. at 14; Comments of the Coalition of Concerned Utils. at 37-39; Comments of the Edison Electric Institute & the Utils. Telecom Council at 96-98; Comments of Verizon at 6-16; Comments of CenturyTel, Inc. at 14; Comments of the United States Telecom Association at 13-15; Comments of Qwest Communications Int’l Inc. at 4-5; Initial Comments of Florida Power & Light & Tampa Elec. Regarding ILECS and Pole Attachment Rates at 12-13; Comments of Alabama Power, Georgia Power, Gulf Power & Mississippi Power at 15-16.

Section 224(a)(4) – “ ‘any attachment by a cable television system or provider of telecommunications service.’ ” See *National Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 336 (2002) (quoting & citing 47 U.S.C. § 224(a)(4)) (emphasis added). In other words, subsections “224(d) and (e) work *no* limitation on §§ 224(a)(4) and (b).” *Id.* at 337.

The statutory disconnect between subsection (a)(4) and subsections (d)(3) and (e)(1) represents a delegation of lawmaking authority to the Commission to fill in the statutory interstices through interpretations promoting the public interest. See TWC Comments at 44. That makes sense. As the Court explained in *Gulf Power*, “Congress may well have thought it prudent to provide set formulas for telecommunications service and ‘solely cable service,’ and to leave unmodified the FCC’s customary discretion in calculating a ‘just and reasonable’ rate for commingled services” because such services “might be expected to evolve in directions Congress knew it could not anticipate.” *Id.* at 339. Thus, in this proceeding, even the electric utilities in their comments appreciate that the Commission is not hamstrung by the two statutory rate methodologies in providing an attachment rate for cable and telecommunications services commingled with broadband Internet access service. ^{2/}

The Commission has recognized and applied its discretion to adopt just and reasonable rates under Section 224 apart from the two statutory

^{2/} See, e.g., Comments of Ameren Services Co. & Virginia Elec. & Power Co. at 23-27; Comments of PacifiCorp, Wisconsin Elec. Power Co. & Wisconsin Pub. Serv. Corp. at 14-15; Comments of Verizon at 15; Comments of CenturyTel, Inc. at 14; Comments of Qwest Communications Int’l Inc. at 4-5.

methodologies. On two separate occasions, the Commission determined to apply the Cable Rate to attachments used by cable operators to provide Internet service commingled with cable service. ^{3/} On one of these occasions – the *1998 Pole Attachment Report & Order* – the Commission explained that its decision was motivated by a recognition that “where Congress affirmatively wanted a higher rate for a particular service . . . it provided for one,” and that a policy mandating a “higher or unregulated” rate would undercut the “pro-competitive” goal of the 1996 Telecommunications Act to “encourage expanded services.” ^{4/} Both times the Commission invoked this discretion it met with court approval. ^{5/}

Accordingly, as AT&T concludes in its comments, “[t]he Commission’s establishment of a uniform rate for pole attachments used for broadband Internet access service would be a fully warranted exercise of the Commission’s expansive regulatory authority under section 224 as endorsed by the Supreme Court.” AT&T Comments at 24. That uniform rate, as explained below, should be set at the Commission’s existing, fully-compensatory and constitutional Cable Rate.

^{3/} See *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules & Policies Governing Pole Attachments*, 13 F.C.C.R. 6777, 6792-6796 (1998) [*1998 Pole Attachment Report & Order*]; *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 F.C.C.R. 7099 (1991).

^{4/} *1998 Pole Attachment Report & Order*, 13 F.C.C.R. at 6796, ¶ 34.

^{5/} See *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 935 (D.C. Cir. 1993) (affirming *Heritage* order); *Gulf Power*, 534 U.S. at 337 (affirming *1998 Pole Attachment Report & Order*).

B. The Comments Make Clear That The Cable Rate Fully Compensates Utilities For Cable Operator Pole Attachments.

In its *NPRM*, the Commission inquires whether the Cable Rate “results in a subsidized rate,” *NPRM*, ¶ 19, given that it allegedly “does not include an allocation of the cost of unusable space,” *id.* at ¶ 22. Commenting parties demonstrate that the correct answer to this question is “no” – the Commission’s Cable Rate does not subsidize cable operators or their subscribers at the expense of utility ratepayers and shareholders – and that its very premise is false – the Cable Rate allocates to cable operators a proportionate share of the cost of the *entire* pole.

The comments, including those of ILEC utilities, demonstrate that the Cable Rate is just and reasonable and adequately compensates – indeed *over*compensates – utilities for cable operator attachments to their poles. ^{6/} That rate is set at the upper bounds of the statutory range created by Congress, ^{7/} as it is based on a utility’s fully-allocated – rather than incremental – costs of pole

^{6/} Comments of CenturyTel at 14; Comments of Verizon at 6; AT&T Comments at 19-21; Comcast Comments at 15-19; TWC Comments at 25-32; State Cable Associations Comments at 4; Comments of the National Cable & Telecommunications Association at 8-13.

^{7/} With Section 224, Congress mandated the Commission to adopt a just and reasonable rate that “assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole.” 47 U.S.C. § 224(d)(1).

attachment. ^{8/} A pole attachment rate based on fully-allocated costs allows the utility to recover from cable operators a proportionate share of “the total cost of the pole, such total costs being the recurring operating expenses and capital costs attributable to the utility pole.” ^{9/} It is thus fundamentally incorrect to think that the Cable Rate does not account for the costs of unusable pole space; “the cable rate pays proportionately for the costs of the entire pole – unusable as well as usable space.” ^{10/}

Because the Cable Rate allows utilities to recover their fully allocated costs of attachment, no subsidy for cable operators or their subscribers is embedded in that rate. As Patricia D. Kravtin explains in her report submitted as part of Comcast’s comments, rates that recover marginal costs are “efficient and subsidy free.” Kravtin Report at ¶ 67. For the Cable Rate to contain a subsidy, it would have to prevent the utility from recovering “costs that *but for* the attacher would not otherwise exist.” Kravtin Report at ¶ 67. But the comments demonstrate that is not the case with the Cable Rate because it allows the utility to recover the marginal costs of attachment through the make-ready process, in addition to rental based on cable operators’ proportional share of all costs of the

^{8/} See, e.g., NCTA Comments at 9; State Cable Associations Comments at 8.

^{9/} S. Rep. No. 95-580, at 20; *accord Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 F.C.C.R. 4387, 4388, ¶ 5 (1987); see also TWC Comments at 30.

^{10/} Comcast Comments at 14; see also TWC Comments at 31 (explaining that “the cost of the entire pole, including the unusable space, is allocated” proportionately under the Cable Rate).

entire pole. ^{11/} In other words: “The rental paid by cable operators . . . reimburses the utilities for all the costs incurred for hosting third-party attachments, **plus** a proportionate share of the costs of all poles (even those purchased by the operator through make-ready), **plus** a share of all pole-related administrative and maintenance expenses, **plus** depreciation, taxes, and even a reasonable profit.” State Cable Associations Comments at 4. As a matter of basic economics, a rate so designed contains no subsidy for cable operators and adequately compensates the utilities. ^{12/}

Indeed, as the comments demonstrate, the Cable Rate more than adequately compensate the utilities – it *overcompensates* them for the costs they incur as a result of cable operator attachments. ^{13/} The commenting parties explain that cable operators receive very few rights in exchange for rental payments under the Cable Rate, ^{14/} a circumstance that Congress envisioned would warrant a pole attachment rate that recovered no more than the *incremental* costs of attachment (not their fully allocated costs as the Cable Rate

^{11/} See, e.g., Charter Communications Comments at 8; NCTA Comments at 12; State Cable Associations at 4; Comcast Comments at 15-19.

^{12/} See Kravtin Report ¶¶ 68-72; see also NCTA Comments at Declaration of Michael D. Pelcovits Decl. ¶¶ 6-10.

^{13/} See, e.g., AT&T Comments at 19-21; NCTA Comments at 10; State Cable Associations Comments at 3-4; Comments of Comcast Corp. at 15-19.

^{14/} See *infra* at 14-16.

permits). ^{15/} Moreover, the economic analyses submitted by Comcast and NCTA demonstrate that the combination of make-ready charges (which often amount to cable-sponsored utility plant upgrades) and Cable Rate rental makes utilities better off than they would be without third-party attachments. ^{16/} As Kravtin explains, for example, “neither utilities nor their electric ratepayers are worse off as a result of the application of the cable rate formula, and in fact, with make-ready, utilities are more likely better off following an attachment by a third party.” ^{17/} Accordingly, one commenter – AT&T – appropriately requests the Commission to modify the Cable Rate in ways that would drive the rate below current levels to eliminate attacher subsidies *to the electric utilities*. ^{18/}

Because the Cable Rate allows utilities to recover the incremental costs of attachment through the make-ready process, plus a rental rate that requires cable operators to pay their proportionate share of the costs of the entire pole, the Commission should exercise its discretion to adopt that just and reasonable rate for attachments used to provide broadband Internet access service. It has already done so for cable operators, and it has discretion to mandate the same result for CLECs.

^{15/} See TWC Comments at 29.

^{16/} See Kravtin Report ¶¶ 69-72; NCTA Comments at Decl. of Dr. Michael D. Pelcovits ¶ 10.

^{17/} Kravtin Report ¶ 72.

^{18/} See AT&T Comments at 19-21.

II. The Commission Should Hold That The Cable Rate Applies To Existing Disputes Involving Commingled Attachments Used By Cable Operators For Broadband Internet Access Service.

While the Commission's *NPRM* proposes to adopt a single, uniform rate for all pole attachments used to provide broadband Internet access service, it does not address how the Commission's new rate will impact existing disputes over the proper rate applicable to commingled attachments used to provide VoIP service. As the commenters recognize, however, there are several pending disputes concerning precisely this issue. ^{19/}

BHN is embroiled in one of them. TECO filed a state court complaint against it in Tampa, Florida, alleging that BHN is liable for years' worth of back pole rental at the Telecom Rate for all of its pole attachments, because they are used to provide BHN subscribers with VoIP Digital Phone service. ^{20/} In response, BHN was forced to initiate a pole attachment complaint proceeding at this Commission, seeking relief from TECO's effort to impose the Telecom Rate on attachments used for VoIP service as an unjust, unreasonable and unlawful term of pole attachment. ^{21/} Both of these proceedings remain pending. The state court litigation has been stayed pending this Commission's resolution of the regulatory classification of VoIP, which is being considered in the

^{19/} See, e.g., Comments of Ameren Servs. Co. & Virginia Elec. & Power Co. at 17.

^{20/} See *Tampa Electric Company v. Bright House Networks, LLC*, No. 06-00819, Complaint (filed Jan. 30, 2006).

^{21/} See *Bright House Networks, LLC v. Tampa Electric Company*, Pole Attachment Complaint (filed Feb. 21, 2006).

Commission's rulemaking proceeding on IP-Enabled services. 22/ The Commission, meanwhile, has yet to conclude its IP-Enabled services proceeding or to resolve BHN's pole attachment complaint.

Although the Commission is currently considering the regulatory classification of VoIP in a different rulemaking proceeding – *i.e.*, whether it is a telecommunications service, a cable service, an information service, or something else entirely – the instant proceeding is clearly designed to fashion the just and reasonable rate for pole attachments used for broadband services, including attachments also used for other services, regardless of the platform over which such services are provided. 23/ However VoIP is ultimately categorized, since all of BHN's attachments are used for broadband Internet access, all of BHN's attachments to TECO's poles will be subject to the Commission's determination here. And, indeed, as the Commission explained in its *NPRM*, its principal purpose in crafting a uniform rate is to alleviate the current market-distorting discriminatory treatment of telecommunications carriers that

22/ *In re IP-Enabled Services*, Notice of Proposed Rulemaking, 19 F.C.C.R 4863 (2004). TECO is currently seeking, for essentially the third time, to have the court's stay lifted. See Tampa Electric's Motion to Revisit Partial Stay, Case No. 06-00819, filed Feb. 6, 2008.

23/ See *NPRM*, ¶ 3 ("tentatively conclud[ing] that all attachments used for broadband Internet access service should be subject to a single rate, regardless of the platform over which those services are provided").

flows from subjecting them to a rate that is higher than that paid by cable operators when both offer similar services – such as voice and data. 24/

Although the Commission does not explain in its *NPRM* how it intends to implement its new uniform broadband pole attachment rate, the Commission should make clear in its order that the Cable Rate, which should serve as the new broadband rate, applies to existing rate disputes, such as the one in which BHN is involved with TECO. Doing so would be manifestly in the public interest. For it would remove the regulatory uncertainty over the rate applicable to attachments used for VoIP service as well as the attendant specter of litigation that has hovered over cable operators' efforts to bring facilities-based competition to the voice market through the roll out of VoIP service. 25/

Even the electric utilities recognize that one of the significant benefits of a uniform broadband rate is that it would alleviate the current confusion over the rate applicable to VoIP service, thereby quieting existing litigation. 26/ A group of utilities explain that a uniform rate for broadband services is "vastly preferable to attempting to determine the regulatory

24/ See *NPRM*, ¶ 31 (uniform rate intended to remedy "regulatory distortion" and promote "nondiscrimination"); see also *id.* at ¶ 36 (concluding that "the critical need to create even-handed treatment and incentives for broadband deployment would warrant the adoption of a uniform rate for all pole attachments used for broadband Internet access service").

25/ See Comcast Comments at 33-35.

26/ See Ameren Servs. et al. Comments at 16-17; EEI/UTC Comments at 43 ("The existence of two different rate formulas for different historical categories of jurisdictional pole attachers perpetuates the problem of unidentified attachments.").

classification of the content that is being transferred at any given time by different classes of providers.” 27/ “Taking this one step,” the utilities conclude, “would eliminate all of the cases before the Commission regarding the regulatory classification of [VoIP] provided by cable operators.” 28/ Even TECO realizes that the Commission’s new rate will “resolve the contentious [VoIP] debate which has mired TECO in litigation in Florida state court and the Enforcement bureau for more than two years.” 29/

On the other hand, if the Commission does not address what rate properly applies to existing disputes over VoIP, the Commission may well trigger even more, counterproductive litigation between pole owners and attachers over the rate applicable to attachments used for VoIP prior to the Commission’s adoption of a uniform broadband rate. That litigation cloud will potentially impede facilities-based voice competition, and the resulting litigation will also impose a needless strain on precious Commission dispute-resolution resources.

The Commission therefore should hold that the new broadband rate – set at the Cable Rate – applies in the context of current disputes over the rate applicable to attachments used for broadband VoIP service. At the very least, even if the Commission were to implement a rate different from the Cable Rate for attachments used for broadband Internet access, it should hold that any such

27/ *Id.* at 17.

28/ *Id.*

29/ See Initial Comments of Florida Power & Light & Tampa Electric Regarding ILECs & Pole Attachment Rates at 12.

new rate applies only prospectively. ^{30/} Commission precedent has applied the Cable Rate to cable operators' commingled attachments used for broadband services,^{31/} and the Commission is required to apply the Cable Rate to such attachments for all past periods. "Retroactivity is not favored in the law." ^{32/} A provision operates retroactively when it "impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed," ^{33/} and the Commission lacks any authority to give a new pole rate retroactive effect. ^{34/}

III. Section 224's Protections Do Not Encompass ILECs, But That Triggers No Serious "Parity" Issue.

While BHN agrees with the Commission's thesis that providers of like communications services should be treated alike, it also agrees with the overwhelming majority of commenters that ILECs do not fit within Section 224's

^{30/} *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

^{31/} *1998 Pole Attachment Report & Order*, 13 F.C.C.R. at 6796, ¶ 34.

^{32/} *Id.*

^{33/} *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

^{34/} *National Min. Ass'n v. Department of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) ("An agency may not promulgate retroactive rules absent express congressional authority.").

rate and access protections. 35/ But that does not mean that Section 224 engenders any ILEC parity problems. The comments demonstrate that cable operators receive far fewer rights under pole attachment license agreements than do ILECs under joint use agreements, thus preventing a meaningful “apples to apples” comparison of the rates charged to cable operators and ILECs.

For example, ILECs are not obligated to incur make-ready expenses to attach to poles because, under joint use agreements, the parties commit to install poles tall enough to accommodate each other’s facilities. 36/ By contrast, cable operators must pay utilities very significant make-ready costs in order to attach to the utilities’ poles. 37/ There are many other critical distinctions between joint use agreements and pole attachment license agreements that further show that ILEC joint use agreements are far more favorable than cable operator pole attachment license agreement. These important differences include:

35/ See, e.g., EEI/UTC Comments at 110-120; Comments of Concerned Utilities at 61-68; Ameren Servs. Co. et al. Comments at 29-32; Comments of PacifiCorp, Wisconsin Elec. Power Co. & Wisconsin Pub. Serv. Corp. at 3-5; Initial Comments of Florida Power & Light & Tampa Electric Regarding ILECs & Pole Attachment Rates at 2-3; TWC Comments at 47-53; NCTA Comments at 16 n.50; UTC Comments at 17-19.

36/ See, e.g., Concerned Utilities Comments at 53; Initial Comments of Florida Power & Light & Tampa Electric Regarding ILECs & Pole Attachment Rates at 5.

37/ See, e.g., Knology Comments at 21; NCTA Comments at 10.

- Joint use agreements do not require ILECs to obtain attachment permits, but pole attachment license agreements require cable operators to do so. 38/
- Joint use agreements do not require ILECs to pay for inspections of their plant, but pole attachment license agreements require cable operators to do so. 39/
- Joint use agreements do not require ILECs to obtain rights-of-way, but pole attachment license agreements require cable operators to do so. 40/
- Joint use agreements do not require ILECs to pay for relocations or rearrangements of their facilities, but pole attachment license agreements require cable operators to do so. 41/
- Joint use agreements guarantee ILECs use of a certain number of feet of pole space, whereas cable operators rent only one foot of space on the pole that they use and are not guaranteed the availability of that space. 42/

But even apart from the far different suite of rights that ILECs receive under joint use agreements, the regulated rates that cable operators pay under pole attachment license agreements cannot be meaningfully compared to the payments made by ILECs under joint use arrangements. As the comments of electric utilities explain, the payments that ILECs make under joint use

38/ See, e.g., Concerned Utilities Comments at 54; Initial Comments of Florida Power & Light & Tampa Electric Regarding ILECs & Pole Attachment Rates at 5.

39/ See, e.g., Concerned Utilities Comments at 54.

40/ See, e.g., *id.* at 54-55.

41/ See, e.g., *id.* at 55-56.

42/ See, e.g., Concerned Utilities Comments at 55; EEI/UTC Comments at 52.

agreements are not “rental” payments like those made by cable operators under pole attachment license agreements. Rather, because the parties to joint use agreements both agree to own a specified percentage of poles, joint use agreements call for “adjustment” payments only when there is an imbalance in pole ownership. ^{43/} In other words, if the joint users maintain their allocated share of pole ownership, no money changes hands. ^{44/} Only when a joint user fails to maintain its ownership share – and thus requires the pole owner to bear the costs of owning a higher proportion of poles than contemplated in the joint use agreement – does the joint user end up owing significant “adjustment” payments. ^{45/}

Thus, the Commission cannot simply compare the very different payments that ILECs and cable operators make to electric utilities in considering the issue of “parity.” That calculus must take account of the far more favorable rights that ILECs receive under joint use agreements. And it must also appreciate that ILEC payments themselves may reflect those very different rights.

^{43/} See Comments of Oncor Electric Delivery Company at 26; *see also* Comments of Alabama Power, Georgia Power, Gulf Power & Mississippi Power at 8; Initial Comments of Florida Power & Light & Tampa Electric Regarding ILECs & Pole Attachment Rates at 5.

^{44/} See Comments of Oncor Electric Delivery Company at 26; *see also* Comments of Alabama Power, Georgia Power, Gulf Power & Mississippi Power at 8; Initial Comments of Florida Power & Light & Tampa Electric Regarding ILECs & Pole Attachment Rates at 5.

^{45/} See UTC Comments at 5-6.

IV. The Utilities' Data On The Number Of Attaching Entities Are Unreliable And It Would Be Inappropriate For The Commission To Adjust Its Presumptions Based On Such Self-Serving And Unverifiable Data In This Proceeding.

A. *The Commission Should Not Rely On Entity Data That Cannot Be Tested In This Proceeding.*

Electric utility commenters in this proceeding request the Commission to alter the Commission's rebuttable presumptions regarding the number of attaching entities which are used for calculating the Telecom Rate. The utilities argue, based on self-reported data, that the presumptions are inaccurately set too high. ^{46/} The Commission need not deal with this issue if it decides to apply the Cable Rate to broadband attachments, as BHN urges. But in any case, the Commission should decline the utilities' request, for this broad-based rulemaking proceeding is not the proper vehicle for the Commission to reconsider its attaching entity presumptions. It does not provide a forum in which commenting parties or the Commission can verify or test the entity data unilaterally submitted by the utilities, and it would be wholly inappropriate to accept such self-reported (and entirely self-serving) data at face value.

The inability to verify the utilities' entity data is significant because their analyses are often inaccurate and disputed by cable operators, ^{47/} including some the very analyses that utilities rely on in this proceeding. See *infra* at 19-21.

^{46/} See, e.g., EEI/UTC Comments at 45-48; Concerned Utilities Comments at 13-18.

^{47/} See, e.g., Comments of Knology Inc. at 7 ("Utilities invariably claim that the average number of attachers is low – often to unrealistically extreme levels.").

For example, utilities sometimes fail to restrict their entity analyses to poles that have cable attachments, as required by Commission precedent. ^{48/} That mistake alone can significantly skew the average number of attachers that a utility contends are attached to its poles.

Moreover, utilities often base their entity analyses on attachment records, rather than physical pole audits, which can also lead to inaccurate average numbers of attaching entities. For instance, this approach may fail to include many ILEC attachments because they do not apply for attachment under joint use agreements, or attachments made by governmental entities, as required by the Commission. ^{49/} Indeed, if the utilities' claims are to be believed, this approach would also fail to account for a significant number of unauthorized attachments. All of these omissions would again inappropriately skew the average number of attaching entities downward.

Given commenting parties', as well as the Commission's, inability to verify the utilities' entity data in this proceeding to see whether the data reflect any of these or other mistakes, the Commission should not undertake to overhaul its entity presumptions based on those data. Nor is there any pressing need to

^{48/} See, e.g., *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d 59, ¶ 21 (1979).

^{49/} See *In re Amendment of the Commission's Rules & Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 16 F.C.C.R. 12,103, 12,140, ¶ 72 (2001) ("[W]e set a presumptive average number of attaching entities at five (5) to reflect the inclusion of, but not limited to, the following possible attaching entities: electric, telephone, cable, competitive telecommunications service providers and governmental agencies.").

revise the Commission's entity presumptions in this proceeding. The Commission's rules provide a mechanism for a utility, in a concrete case where its assertions can be challenged by an affected cable operator, to rebut the entity presumptions. ^{50/} And, again, if the Commission applies the Cable Rate to commingled broadband Internet access attachments, there is no call even to consider the mechanics of the Telecom Rate in this proceeding.

B. Tampa Electric Company's Entity Data Are Inaccurate And Are The Subject Of A Dispute Currently Pending Before The Commission.

BHN knows first hand that utility entity claims cannot be accepted at face value and are frequently disputed by cable operators. In this proceeding, a collection of utilities rely on data submitted by Tampa Electric Company ("TECO") purporting to demonstrate that "the average number of attaching entities in [its] service territory . . . is 2.08." ^{51/} But that assertion is the subject of a pole attachment complaint brought against TECO by BHN that is currently pending before the Commission. See *Bright House Networks, LLC v. Tampa Electric Company*, File No. EB-06-MD-003.

^{50/} See, e.g., *Amendment of Commission's Rules & Policies Governing Pole Attachments*, 16 F.C.C.R. 12,103, 12,139, ¶ 70 (2001). ("As with all our presumptions, either party may rebut this presumption with a statistically valid survey or actual data.").

^{51/} See Initial Comments of Florida Power & Light & Tampa Electric Regarding ILECs & Pole Attachment Rates at 16; Comments of Alabama Power, Georgia Power, Gulf Power & Mississippi Power at 22-23 (relying on TECO entity data).

In that complaint proceeding, BHN pointed out that TECO's average entity calculation is only a sliver above the absolute bare minimum the Commission will accept and is based on evidence that is not credible or verifiable.^{52/} See BHN Reply, File No. EB-06-MD-003, at 22-23 (filed April 25, 2006). BHN also pointed out that TECO arrived at its average entity number by dividing all of the attachments in its records by all of its poles. *Id.* at 22-23. This was error: By including poles that only contain electric attachments, TECO violated the Commission's rule that only poles that contain cable attachments can be used in the entity analysis.^{53/} *Id.* at 23. Removing the electric-only poles from the equation that TECO included immediately drives the average from 2.08 up to 2.57 attached entities per pole.

Yet even that revision does not fix everything; the average still remains under-representative. BHN submitted affidavit evidence demonstrating that many of the TECO poles to which BHN had attached contain at least three attached entities: TECO, BHN, and the ILEC. *Id.* at 23. These poles also contain governmental entity attachments, including for traffic signalization. *Id.* Including these attachments in the analysis would further increase the average

^{52/} See *Amendment of Commission's Rules & Policies Governing Pole Attachments*, 16 F.C.C.R. at 12,134, ¶ 60 ("[W]e include the utility pole owner in the count, resulting in a *minimum of two attaching entities being counted*." (emphasis added)); see also *Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 16 F.C.C.R. 20,238, 20,242-43, ¶ 11 (Cable Serv. Bur. 2001) ("We have already concluded that the minimum possible number of attachers to be used in the Telecom Formula is two.").

^{53/} See, e.g., *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d 59, ¶ 21 (1979).

number of entities attached to TECO's poles. The Commission thus cannot place any faith in TECO's data. Nor should the Commission accept the self-serving analyses proffered by other utilities whose data cannot be disputed here.

V. The Commission Should Reaffirm Its Precedents Governing Terms And Conditions Of Pole Access.

A. The Commission Should Reaffirm Its "Sign and Sue" Rule As It Is Currently Formulated.

In its *NPRM*, the Commission asks whether it should "adopt some contours" to its rule – known as the "sign and sue" rule – under which "an attacher may execute a pole attachment agreement with a utility, and then later file a complaint challenging the lawfulness of a provision of that agreement." *NPRM*, ¶ 37 n.110. The Commission should decline to do so, for the rule, as currently formulated, has been upheld in court and serves an important purpose. See *Southern Co. Serv. v. FCC*, 313 F.3d 574, 582-84 (D.C. Cir. 2002). The rule is in need of no refinements.

As commenting parties explain and the Commission has long recognized, cable operators and utilities do not bargain on equal footing when negotiating pole attachment license agreements. ^{54/} As a result, cable operators

^{54/} See NCTA Comments at 23; Knology Comments at 10; Comcast Comments at 42; see also *Selkirk Comm., Inc. v. Florida Power & Light*, 8 F.C.C.R. 387, 389 ¶ 17 (1993) ("Due to the inherently superior bargaining position of the utility over the cable operator in negotiating the rates, terms and conditions for pole attachments, pole attachment rates cannot be held reasonable simply because they have been agreed to by a cable company."); *Heritage*, 6 F.C.C.R. at 7105, ¶ 31 (acknowledging "superior bargaining position utilities typically enjoy over cable operators in negotiating the rates, terms and conditions for pole attachments").

are frequently required to accept unreasonable utility terms in order to secure access to utility poles that represent an essential facility for cable operators to deliver their communications services. 55/ The Commission's rule helps address this imbalance of power and its consequences by authorizing cable operators to agree to unreasonable utility terms, which they can later challenge at the Commission, without having to sacrifice vital pole access. 56/ Indeed, the existence of the ability to challenge a term in a pole attachment agreement encourages utilities to negotiate with cable operators in good faith. 57/ Preventing a cable operator or CLEC from challenging a provision in an agreement after the fact would essentially require the party to either wait months before entering into an agreement while an issue is litigated at the Commission, 58/ or to waive its rights to obtain Commission relief from unreasonable terms and conditions imposed by the utilities.

55/ See NCTA Comments at 23; Knology Comments at 10; Comcast Comments at 42.

56/ See, e.g., *Selkirk Comm.*, 8 F.C.C.R. at 389, ¶ 17.

57/ See *Amendment of the Rules & Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 F.C.C.R. 4387, 4397, ¶ 77 (1987) ("Our willingness to review contract provisions and the possibility of either revising an unlawful term or condition or ordering an adjustment to the maximum rate because of an onerous term or condition should serve as an impetus to utilities to negotiate in good faith with regard to terms and conditions of the agreement before they are presented to the Commission.").

58/ The prospect of a quick resolution at the Commission is not realistic. When Time Warner Cable brought an access complaint to the Commission regarding Kansas City Power & Light, the Commission refused to set an expedited briefing schedule and took more than two months to resolve the

The only “contour” that the Commission proposes to add to the rule in its *NPRM* – *i.e.*, “time-frames for raising written concerns about a provision of a pole attachment agreement” – is unworkable and threatens to undermine the important check on utility abuses that the rule provides. Superimposing artificial deadlines onto the sign and sue rule is contrary to the Commission’s statutory obligation to curb unjust and unreasonable terms and conditions of pole attachment – regardless whether the cable operator agreed to the term or condition. See 47 U.S.C. § 224(b)(1); see *also* Knology Comments at 11-12. Such deadlines would simply encourage utilities to wait out the Commission’s arbitrary time period before initiating an abusive practice – which then would be beyond the Commission’s reach to stop. Under such a regime, utility abuses no doubt would be “rampant.” See Comcast Comments at 45.

An artificial shot clock on complaints would also be burdensome and wasteful and would carry the untoward and unintended consequence of increasing litigation before the Commission over pole attachment terms and conditions. See Knology Comments at 11; Comcast Comments at 45. In many cases, utility terms and conditions that appear reasonable on their face later become unreasonable through utility interpretations and applications. With this reality in mind and in order to preserve their rights, cable operators would inevitably seek Commission rulings on the proper interpretations and applications

Complaint. See *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, 14 F.C.C.R. 11,599 (Cable Serv. Bur. 1999).

of terms and conditions that may come to be enforced unreasonably in the future. Cable operators and utilities would thus be compelled to waste time and money litigating abstract issues that may never blossom into a live dispute. And the proliferation of suits testing the metes and bounds of utility terms and conditions would undoubtedly bloat the Commission's pole attachment litigation docket, imposing further strain on already scarce Commission resources.

For all of these reasons, the Commission should leave its judicially-approved and effective sign and sue rule as is.

B. The Commission Should Reaffirm That Attachments To Drop Poles May Be Licensed After They Are Made.

The Commission also seeks comment "regarding practices related to drop lines and poles." See *NPRM*, ¶ 37. In BHN's experience, it remains virtually a uniform practice that utilities allow cable operators to permit drop pole attachments after, rather than before, they are made. This is important because requiring a cable operator to submit to the full permitting process before making attachments to drop poles would, as other commenters recognize, significantly delay the operator's ability to provide service to new subscribers.^{59/} There is no reason for such delays: Unlike standard pole attachments, wires extending from the pole to a home or business do not involve any significant safety, reliability, or

^{59/} See Knology Comments at 18; Joint Comments of Alpheus Communications, L.P. & 360Networks (USA), Inc. at 3; Comments of Wow! Internet Cable & Phone at 5-6; Comments of Fibertech Networks, LLC & Kentucky Data Link, Inc. at 29-31.

engineering concerns. ^{60/} Because some utilities have nevertheless begun to assert that attachments to drop poles must be licensed before they are made, however, BHN concurs with the commenters that the Commission should take this opportunity to reaffirm that cable operators need not pre-license attachments to drop poles. See *Salsgiver Communications, Inc. v. North Pittsburgh Tel. Co.*, 22 F.C.C.R. 20,536, 20,543-44, ¶¶ 24-25 (2007); *Mile High Cable Partners, L.P.*, 15 F.C.C.R. 11,450, ¶ 19 (Cab. Serv. Bur. 2000).

CONCLUSION

For all of the forgoing reasons, the Commission should adopt the Cable Rate for attachments used for broadband services. The Commission has wide discretion to adopt that rate for broadband attachments, and that rate more than compensates utilities for the costs they incur to allow attachments to their poles. The Commission should also hold that that rate applies in the context of current disputes over the rate that applies to commingled cable operator attachments used to provide VoIP service.

The Commission should not, however, extend Section 224's statutory protections to ILEC utilities; it clearly lacks any statutory authority to do so. Given ILECs' far greater rights under joint use agreements, there is also no pressing need to bring ILECs into Section 224's protective fold in order to achieve rate parity between ILECs and other communications attachers.

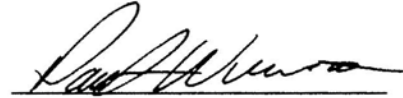
^{60/} See Wow! Comments at 6; Fibertech Comments at 30.

The Commission should also decline to modify its attaching entity presumptions based on the utilities' self-reported and self-serving entity data. Those data cannot be verified in this proceeding, as neither commenting parties nor the Commission can test them. Yet such data are often flawed, as BHN knows as a result of contesting some of the very data that the utilities rely on in this proceeding in their effort to prompt the Commission to overhaul its presumptions. Those presumptions are rebuttable in any event, further confirming that claims of fewer attachers than presumed by the Commission are properly evaluated on a fact-specific, case-by-case basis where the data can be disputed.

The Commission should also reaffirm its key terms and access precedents. Thus, the Commission should reaffirm the sign and sue rule as is, without adopting arbitrary and counterproductive time limits on cable operators' rights to challenge unjust and unreasonable utility terms and conditions of pole attachment. The Commission should likewise reaffirm that attachers are not required to pre-license attachments to drop poles because that would impede

cable operators' ability to timely deliver service to their subscribers – and for no good reason.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gardner F. Gillespie", written over a horizontal line.

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